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# Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation

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## Introduction

> *"The identity cannot be compartmentalized; it cannot be split in halves or thirds, nor have any clearly defined set of boundaries. I do not have several identities, I only have one, made of all the elements that have shaped its unique proportions."*
> *–Amin Maalouf*[1]

Beginning with Kimberlé Crenshaw's groundbreaking 1989 article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,[2] the legal world started to analyze how antidiscrimination law marginalizes individuals who fall into more than one protected category.[3] However, in the more than twenty years since the publication of Crenshaw's article, employment discrimination plaintiffs who bring claims based on more than one protected category (e.g., race and sex discrimination) fare significantly worse than plaintiffs bringing claims based on only one protected category (e.g., race discrimination).[4] This idea—that discrimination affects individuals who fall into multiple protected categories in different ways than individuals in just one protected

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1. Amin Maalouf, *Les Identité Meurtrièl [Deadly Identities]*, 4 AL JADID, no. 25, 1998 (Brigitte Caland trans.), *available at* http://www.aljadid.com/content/deadly-identities.

2. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

3. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1482 (2009).

4. *See infra* Parts III–IV.

category—is called the theory of intersectionality.[5] The concept of intersectionality has become increasingly accepted in the academic world, but courts applying employment antidiscrimination laws to plaintiffs asserting claims based on multiple categories of discrimination still require plaintiffs to compartmentalize, separate, and split the various aspects of their identity.[6] This has the effect of rendering their claims "virtually noncognizable in the adjudication context."[7]

This Article aims to fill a hole in the field of intersectionality research by introducing empirical data showing that courts do indeed treat plaintiffs bringing multiple claims of discrimination (multiple claimants) significantly worse than traditional, single-claim plaintiffs (single claimants). Although there is a well-developed body of theoretical work on intersectionality in employment discrimination litigation, "there has been virtually no empirical research that addresses the effects of intersectionality on litigation outcomes."[8]

This Article presents an analysis of court opinions showing that multiple claimants fare significantly worse than single claimants in moving beyond the summary judgment stage. There are multiple reasons as to why this may be occurring. This Article argues that courts need to drastically rethink their approach to multiple claimants in employment discrimination cases. Part I discusses the history and development of employment discrimination law in America. Part II addresses contemporary problems in employment discrimination. Part III addresses prior empirical research on litigation outcomes for multiple claimants. Part IV presents an in-depth analysis of the empirical findings of this study regarding litigation outcomes for multiple claimants. Finally, Part V discusses some of the reasons multiple claimants may be faring worse and introduces potential solutions.

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5. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 83–84 (2011) (describing the structures that allow intersectional discrimination to persist).

6. *See* Kotkin, *supra* note 3, at 1461 (stating that while courts have recognized that plaintiffs are allowed to bring claims based on multiple protected categories, most courts still analyze each claim separately).

7. Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 738 (2011).

8. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011).

## I. History and Development of American Employment Discrimination Law

### A. *Title VII and Its Progeny*

Title VII was passed in 1964 to protect American workers from being discriminated against in the workplace on the basis of protected categories: race, color, religion, sex, and national origin.[9] Title VII was primarily intended to address blatant forms of excluding African Americans from the workplace.[10] A popularly accepted view is that sex was added as a protected category under Title VII in order to make it unacceptable to some of its supporters or to defeat it by "laughing it to death."[11] However, many scholars now claim that this story is apocryphal, and that sex was added as a protected category for legitimate purposes.[12] The aim of the statute was to, on a macro-level, discourage employment practices that traditionally favored one group over another by providing financial remedies to individual plaintiffs who could show that they were victims of discriminatory employment practices based on a protected characteristic.[13] Congress later passed similar antidiscrimination statutes to protect other categories of individuals in the workplace, including the Age Discrimination in Employment Act (ADEA) of 1967[14] and the Americans with Disabilities Act (ADA) of 1990.[15]

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9. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2).

10. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979).

11. *See, e.g.*, Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453 (1980).

12. *See id.* at 454.

13. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975).

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

*Id.* (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (1973)).

14. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621(a)(1) (2006)).

15. Americans with Disabilites Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–203 (2006)).

### *B. Frameworks for Analyzing Employment Discrimination Claims*

In interpreting employment discrimination claims, the Supreme Court began to develop frameworks for analyzing different types of claims. There are two types of employment discrimination claims: disparate treatment and disparate impact.[16] Disparate impact claims involve a showing that an employer's facially neutral employment policy has a disproportionate, negative effect on a particular protected class of employees.[17] Although disparate impact claims do not require a showing of intent, they do require evidence that the employment policy in question creates a statistically significant disparity.[18]

Disparate treatment claims, on the other hand, require a showing that the employer took an adverse employment action against an individual employee because of a protected factor, such as race, and that the conduct was intentional.[19] Disparate treatment claims are further divided into those based on direct evidence of discrimination and those based on circumstantial evidence of discrimination.[20] Today, direct evidence claims are rare and rely on "evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[21] This type of evidence usually comes in the form of a comment made directly to the employee that links the adverse employment decision to a protected category. An example of direct evidence of discrimination would be an employer's comment to a Hispanic applicant that the employer does not hire persons of Hispanic descent. Courts have differed in their interpretation of what constitutes direct evidence of discrimination in the employment context. Some courts adopt a definition of direct evidence as meaning evidence which, if believed, proves the existence of discriminatory animus without inference or presumption.[22]

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16. Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010).

17. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 986–87 (1988).

18. Sperino, *supra* note 5, at 106.

19. *Lewis*, 130 S. Ct. at 2199.

20. Paz v. Wauconda Healthcare & Rehab. Ctr., LLC, 464 F.3d 659, 666 (7th Cir. 2006).

21. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989).

22. *See, e.g.*, Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999) ("Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." (internal quotations omitted)); Haas v. ADVO Sys., Inc., 168 F.3d 732, 734 n.2 (5th Cir. 1999) (explaining that direct evidence will show the employer "actually relied on" the characteristic when making the employment decision). Other courts have defined "direct evidence" for this purpose as evidence, both direct and circumstantial, of conduct or statements

The most common type of claim in modern employment discrimination litigation is the disparate treatment claim that relies on circumstantial evidence.[23] Due to its prevalence, this type of claim will be the focus of this Article.

### 1. The *McDonnell Douglas* Framework

The Supreme Court has developed two types of frameworks to analyze circumstantial evidence disparate treatment claims. The *McDonnell Douglas* framework was developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*[24] to apply to circumstantial evidence disparate treatment claims, and is applied to Title VII, ADEA, ADA, and § 1983 claims.[25] Once a court determines that there is no direct evidence of discrimination to support a plaintiff's claim, the court applies a three-part, burden-shifting framework.[26]

Part one of the *McDonnell Douglas* framework requires the plaintiff to establish a prima facie case of discrimination.[27] This

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that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision. *See, e.g.*, Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) ("Such a showing [of direct evidence] requires evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." (quotations omitted)). Still other courts hold that that as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision. *See, e.g.*, Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997) ("[A] plaintiff may carry his [or her] burden of proving that a forbidden factor was a motive in his termination through either direct or circumstantial evidence . . . .").

23. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163 (1995).

24. 411 U.S. 792 (1973).

25. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 52–54 (2003) (applying the *McDonnell Douglas* framework to an ADA claim); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (assuming that the *McDonnell Douglas* framework applies to ADEA suits); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 n.1 (1993) (assuming that the *McDonnell Douglas* framework applies to 42 U.S.C. § 1983 claims).

26. *McDonnell Douglas*, 411 U.S. at 802.

27. *See* Bearden v. Int'l Paper Co., 529 F.3d 828, 831 (8th Cir. 2008). *McDonnell Douglas* itself was a failure-to-hire case, so the language of the framework initially was that the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (1973). This language necessarily shifts due to the facts of each case, and each circuit uses slightly different language. *Id.* at n.13. This Article uses language from the Eighth Circuit because the cases analyzed herein are from

requires the plaintiff to prove that he or she (1) is a member of a protected class; (2) is meeting his or her employer's legitimate job expectations; (3) suffered an adverse employment action; and (4) was treated differently from similarly situated employees outside the protected class.[28] At the prima facie stage of the *McDonnell Douglas* test, establishing whether employees are similarly situated requires that the employees be "involved in or accused of the same or similar conduct and are disciplined in different ways."[29]

After the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for his or her action.[30] If the defendant articulates such a reason, "the burden returns to the plaintiff to show that the proffered reason is pretextual."[31] At this stage, the test for determining if other employees are similarly situated to the plaintiff is rigorous.[32] The plaintiff must show that any individuals offered by them to show discrimination are similarly situated in all relevant respects.[33] Thus, to prove that an individual is similarly situated, "the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances."[34] This burden-shifting framework is applied in the vast majority of employment discrimination litigation,[35] and creates a heavier burden on the plaintiff than the defendant.[36]

### 2. The Mixed-Motive Framework

Another framework for analyzing employment discrimination cases is the so-called mixed-motive framework, first articulated by

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the Eighth Circuit.

28. Fields v. Shelter Mut. Ins. Co., 520 F.3d 859, 864 (8th Cir. 2008) (quoting Carpenter v. Conway Cent. Express, Inc., 481 F.3d 611, 616 (8th Cir. 2007)).

29. Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 851 (8th Cir. 2005) (quoting Wheeler v. Aventis Pharms., 360 F.3d 853, 857 (8th Cir. 2004)).

30. *Bearden*, 529 F.3d at 831–32.

31. *Id.* at 832.

32. *Rodgers*, 417 F.3d at 853.

33. Hervey v. Cnty. of Koochiching, 527 F.3d 711, 720 (8th Cir. 2008).

34. *Id.* The Eighth Circuit adheres to a narrow interpretation of similarly situated, while the First, Second, Fourth, Fifth, Seventh and Tenth Circuits apply a less stringent standard. Howard Lavin & Elizabeth DiMichele, *Split Circuits: Supreme Court's Denial of Certiorari in* Hervey *Leaves Circuits Not 'Similarly Situated,'* 35 EMP. REL. L.J. 1, 1 (2009).

35. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 54 (7th ed. 2008) (noting that in 2006 alone, the framework was cited in over three thousand cases).

36. *Id.* at 43.

the Supreme Court in *Price Waterhouse v. Hopkins*,[37] a sex discrimination claim. This framework applies when the employer considers both legitimate and illegitimate factors when making an employment decision.[38] In *Price Waterhouse*, the Court found that the plaintiff's aggressive personality was a legitimate reason for her termination, but that it coexisted alongside illegitimate reasons, namely sex discrimination and stereotyping due to the decision makers' belief that the plaintiff was not "feminine" enough.[39]

In establishing the mixed-motive framework, Justice Brennan, writing for a plurality of four justices, stated that once a plaintiff proves that an illegitimate factor plays a "motivating part" in the employment decision, the burden shifts to the defendant to prove "by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive."[40] However, Justice O'Connor, writing in a separate concurrence, held that the plaintiff must prove that an illegitimate criterion played a "substantial factor" in the employment decision, and that "the burden on the issue of causation" would shift to the employer only where "a disparate treatment plaintiff [could] show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[41] O'Connor's concurrence stated the narrowest grounds on which the case could be decided, therefore becoming the holding of the case, and this greatly restricted the situations in which plaintiffs could use the mixed-motive framework.[42]

In 1991, Congress amended the Civil Rights Act "in large part [as] a response to a series of decisions of [the Supreme] Court interpreting the Civil Rights Acts of 1866 and 1964," particularly its decision in *Price Waterhouse*.[43] Interpreting the 1991 amendments, the Supreme Court held in *Desert Palace, Inc. v. Costa*[44] that direct evidence is not required for the plaintiff to show that an illegitimate criterion motivated the employment decision, and that once the plaintiff shows that an illegitimate criterion played a motivating factor in the employment decision, the burden shifts to

37. 490 U.S. 228 (1989).

38. *Id.* at 241.

39. *Id.* at 235 (quoting comments by a Price Waterhouse partner informing the petitioner that she should "walk more femininely, talk more femininely").

40. *Id.* at 250 (Brennan, J., plurality opinion).

41. *Id.* at 276 (O'Connor, J., concurring).

42. *See* ZIMMER ET AL., *supra* note 35, at 43.

43. Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994).

44. 539 U.S. 90 (2003).

the defendant to show by a preponderance of the evidence that they would have made the same decision absent the illegitimate criteria.[45] Lower courts have struggled with how to reconcile the *McDonnell Douglas* framework with the mixed-motive framework, and no particular approach has gained dominance.[46]

## II. Contemporary Problems in Employment Discrimination

### *A. The Changing American Workplace*

Since the laws addressing employment discrimination were written, the American workplace has undergone a transformation in both the demographic composition of workers and the organizational structure of businesses.[47] Studies have shown that non-Whites and women began to make up a significantly larger portion of the workforce following the passage of Title VII.[48] There is evidence to indicate, however, that while access to jobs for non-Whites and women has increased substantially, most employment discrimination litigation today focuses on discriminatory termination or failure to promote, rather than failure to hire.[49]

Since the passage of Title VII, the American workplace has become substantially more diverse, specifically, becoming older, more non-White, and more female.[50] The number of workers ages 55 or older increased 52.4% between 1984 and 2004, and is

45. *Id.* at 100–02.

46. *See* ZIMMER ET AL., *supra* note 35, at 102–05 (describing the alternative approaches to reconciling the *McDonnell Douglas* framework with the mixed-motive framework).

47. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1110–11 (1991) (presenting statistics showing the changing demography of the American workplace since the passage of Title VII); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 487 (2005) (arguing that workplace structure has dramatically changed over past several years).

48. Donohue, *supra* note 47 (noting that since the passage of Title VII, the number of non-Whites in managerial and professional positions had increased by 163.4%, and the number of women in managerial and professional positions had increased by 157.8%).

49. Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219, 236 (1994) (stating that by 1985, EEOC charges alleging wrongful termination "outnumber[ed] hiring charges by more than six to one").

50. Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25, 26 (2005) (showing the percentage increases of non-Whites and women in the American workforce); Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, 128 MONTHLY LAB. REV. 25, 25 (2005) (showing the trending and projected increases in older workers in the American workforce).

projected to continue to rise.[51] Women now make up 49.9% of the American workplace, and their participation rate is expected to climb in the coming years.[52] In terms of race, the percentage of White participation in the workforce declined from 80.4% in 1984 to 70% in 2004, and is projected to be at 65.6% in 2014, with Hispanics accounting for 15.9% of the anticipated 2014 workforce, Blacks accounting for 12%, and Asians accounting for 5.1%.[53] As the diversity of the workplace increases, so too does the number of multiple claimants.[54]

### *B. The Changing Nature of Discrimination*

Research on the nature of discrimination in the workplace suggests that discrimination is no longer blatant and overt, but rather, is now subtle and hidden.[55] In their research on unconscious discrimination, social scientists theorize that the natural human tendency to categorize people and objects can result in a reliance on stereotypes.[56] Stereotypes cause discrimination by unconsciously influencing what types of information are recalled about a particular individual.[57] Studies have demonstrated that once a person holds a stereotypic expectancy about a certain category of individuals, they are less likely to remember behavior that does not conform to those stereotypes, and will even falsely remember behavior as conforming to stereotypes, even when it did not.[58]

Research focusing on stereotypes of those who fall into more than one minority category show that non-White women and men face different stereotypes than White women and men, and that these stereotypes are more likely to lead to negative discrimination.[59] Employers stereotype young Black men as lazy, belligerent, or dangerous,[60] but they stereotype Black women as

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51. Toossi, *supra* note 50, at 38.

52. *Women in the Workforce: Female Power*, ECONOMIST, Jan. 2–8, 2010, at 49, 49.

53. Toossi, *supra* note 50, at 26.

54. *See* U.S. Equal Emp't Opportunity Comm'n, *Why Do We Need E-Race?*, http://www.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm (last visited Feb. 29, 2012).

55. *See* Lee, *supra* note 47, at 482.

56. Krieger, *supra* note 23, at 1186.

57. *See id.* at 1199.

58. *See id.* at 1209.

59. Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487, 500 (2003). Research on intersectional stereotypes has focused primarily on the intersection of race and gender. *Id.*

60. *Id.*; *see also* PHILIP MOSS & CHRIS TILLY, STORIES EMPLOYERS TELL: RACE,

distracted, single mothers desperate for a paycheck.[61] These studies do not suggest that one group suffers a worse form of discrimination, but rather that persons with intersecting characteristics face different stereotypes that lead to discrimination.[62] Further, it is hard to separate these different parts of an individual's identity and the ways in which these parts affect the stereotypes others hold of that individual.[63]

### *C. Intersectionality*

#### 1. Theory of Intersectionality

There is a rich body of scholarly articles on the topic of intersectionality in the employment context,[64] mostly from a critical feminist perspective.[65] Intersectionality theorists argue that race and sex discrimination claims are limited to the experiences of the privileged members of each group.[66] For example, sex discrimination claims are viewed in terms of the race-privileged members of the group (White women), while race discrimination claims are viewed in terms of the sex-privileged members of the group (non-White males).[67] These scholars have called for a "more nuanced interpretation of Title VII that permits the aggregation of claims,"[68] and have advocated for the creation of an "intersectional" claim for groups with multiple burdens.[69] They argue that claims based on a single axis of discrimination do not accurately capture the experiences of those who are multiply burdened because intersectionality is "the oppression that arises out of the combination of various forms of discrimination, which together produce something unique and distinct from any one form of discrimination standing alone."[70] Most of these articles "focus

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SKILL, AND HIRING IN AMERICA 102 (2001); Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But...": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 213 (1991).

61. Browne & Misra, *supra* note 59; Ivy Kennelly, *That Single-Mother Element: How White Employers Typify Black Workers*, 13 GENDER & SOC'Y 168, 181 (1999).

62. Browne & Misra, *supra* note 59, at 500.

63. *Id.*

64. Best et al., *supra* note 8, at 991.

65. *See* Kotkin, *supra* note 3, at 1481.

66. D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 555 (2008).

67. *Id.*

68. Kotkin, *supra* note 3, at 1481.

69. Lacy, *supra* note 66, at 554–55.

70. Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 64 (2004).

primarily on the race/gender paradigm and do not provide a framework for the recognition of differently conjoined classes, such as age and disability."[71] In addition, these articles have not focused on litigation outcomes for multiple claimants,[72] or on the problems of proof faced by these plaintiffs.[73]

Kimberlé Crenshaw introduced the concept of intersectionality in a seminal 1989 article.[74] In this article, Crenshaw used the case *DeGraffenreid v. General Motors Assembly Division*[75] to illustrate her argument that the experiences of Black women are oftentimes overlooked or marginalized by "the tendency to treat race and gender as mutually exclusive categories of experience and analysis."[76] She argued that this tendency "is perpetuated by a single-axis framework that is dominant in antidiscrimination law."[77] Crenshaw concluded that while Black women's experiences of discrimination sometimes correspond with those of White women or Black men, they oftentimes experience a unique form of bias that is directed specifically towards Black women; this form of bias is largely ignored by the courts.[78] After the publication of her article, scholars began to expand Crenshaw's theory of intersectionality to other groups, such as Asian women,[79] Latina women,[80] and Black men.[81]

Because courts have, to one extent or another, taken the collective suggestions of these authors in acknowledging and allowing multiple claims, the focus of some scholars has shifted from arguing that these claims should be recognized to discussing *how* courts should analyze them.[82] Minna J. Kotkin argues that, although courts have allowed multiple claimants to bring their claims, "few courts have engaged in any systematic or rigorous analysis of the possibility of complex discrimination," and that "the courts have given little in the way of evidentiary guidance on how

71. Kotkin, *supra* note 3, at 1481.

72. Best et al., *supra* note 8, at 991.

73. Kotkin, *supra* note 3, at 1481.

74. Lacy, *supra* note 66, at 558 (referencing Crenshaw, *supra* note 2).

75. 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977).

76. Crenshaw, *supra* note 2, at 139.

77. *Id.*

78. *Id.* at 149.

79. *See* Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

80. *See* Reynoso, *supra* note 70.

81. *See* Lacy, *supra* note 66.

82. Kotkin, *supra* note 3, at 1481.

[multiple] claims might be proven."[83] This lack of analysis contributes to multiple claimants' overall lower success rates than single claimants.[84] Similarly, Kathryn Abrams argues that the courts are reluctant to accept the claims of multiple claimants, and that they have offered very little in the way of "help[ing to] explain how [the claims] relate to the forms of race or gender discrimination traditionally protected under the statute."[85] This lack of analysis and explication, she argues, does not provide stable or helpful precedent, and therefore negatively impacts the recognition and success rates of similar future claims.[86]

### 2. The History of Multiple Claims in Employment Discrimination Litigation

At first, courts were reluctant to even recognize multiple claims. Perhaps the most famous example of this phenomenon is *DeGraffenreid v. General Motors Assembly Division*.[87] The plaintiffs, a group of Black women, alleged that General Motors was discriminating against Black women in its seniority system.[88] The court refused to allow them to combine the categories of race and sex into one protected category, stating that to do so would be allowing them to "combine statutory remedies" and "create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended."[89] The court chose instead to analyze the two claims separately, and then dismissed the sex-based claim, illustrating a problem that often occurs for plaintiffs asserting multiple claims of discrimination: the court found that because General Motors had a history of hiring White women, there was no sex discrimination.[90] Similarly, even if the court had not dismissed the race claim, the employer could have combated that claim by showing it had a history of hiring Black men.[91] Thus, under this approach, Black women are only legally

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83. *Id.*

84. *Id.*

85. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2493 (1994).

86. *Id.* at 2498.

87. 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977).

88. *Id.* at 143.

89. *Id.*

90. *Id.* at 143–45.

91. Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C. R. L.J. 199, 200–01 (2006).

protected by Title VII to the extent that their experiences correspond with those of White women or Black men.[92]

Some courts began to specifically recognize and address the unique problems posed by multiple claimants. In *Jeffries v. Harrison County Community Action Ass'n*,[93] the court utilized the newly developed sex-plus theory and applied it to a racial minority for the first time.[94] The plaintiff, a Black female, brought three distinct claims: one based on race, one based on sex, and one based on the combined category of race and sex.[95] In reversing an adverse grant of summary judgment, the court stated that "discrimination against [B]lack females can exist even in the absence of discrimination against [B]lack men or [W]hite women,"[96] and that:

> when a Title VII plaintiff alleges that an employer discriminates against [B]lack females, the fact that [B]lack males and [W]hite females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the [B]lack female plaintiff.[97]

Similarly, in *Lam v. University of Hawaii*,[98] the court reversed the trial court's grant of summary judgment in favor of the defendant.[99] The defendants claimed that they did not discriminate against the plaintiff, an Asian woman, and as proof showed that they subsequently offered the disputed position to a White woman and an Asian man.[100] The appellate court found that the district court was incorrect in viewing the race and sex claims as separate, because "where two bases for discrimination exist, they cannot be neatly reduced to distinct components," and "attempt[ing] to bisect a person's identity at the intersection of

92. *See* Crenshaw, *supra* note 2, at 143.

93. 615 F.2d 1025 (5th Cir. 1980).

94. *Id.* In *Phillips v. Martin Marietta*, the Supreme Court first utilized what has come to be known as a sex-plus theory to find that an employer could not have a policy that discriminated against women with young children at home, but not men with young children at home. 400 U.S. 542, 544 (1971). The sex-plus theory accepts as its premise that discrimination can occur when employees are discriminated against based on a sex-neutral characteristic (such as marital status, or whether the employee has children) that may disguise the underlying sex-based discrimination. *Id.* Essentially, the Supreme Court recognized that Title VII forbids employers from discriminating against a segment of a sexual group simply because they are not discriminating against others in that group. *Id.*

95. *Jeffries*, 615 F.2d at 1030.

96. *Id.* at 1032.

97. *Id.* at 1034.

98. 40 F.3d 1551 (9th Cir. 1994).

99. *Id.* at 1561.

100. *Id.*

race and gender often distorts or ignores the particular nature of their experiences."[101]

However, even though most courts have at least implicitly recognized multiple claims in some form or another, few have explicitly stated that they are doing so. In the "typical" case, judges will treat each claim as standing alone and analyze each separately, without recognition or analysis of the unique struggles that often face the multiple claimant.[102]

## III. Prior Empirical Research on Litigation Outcomes for Multiple Claimants

### *A. The Need for Quantitative Data Regarding Litigation Outcomes for Multiple Claimants*

Although there is a rich body of theoretical literature addressing problems of intersectionality in employment discrimination litigation, there has been very little empirical research on litigation outcomes in this area.[103] Part of the reason for this paucity is a disagreement over methodology that has taken place amongst critical race and feminism scholars.[104] Most scholars studying intersectionality focus entirely on qualitative and interpretive methods, dismissing quantitative research as "overly simplistic and positivist."[105] However, other scholars argue for a reconciliation of qualitative and quantitative methods, arguing that the best method to use depends on the question asked.[106] "While racial, sex, or other categories certainly do not richly describe people's experiences and identities, differing outcomes across these categories are important indicators of structural inequality and social stratification," and "quantitative research may be best suited for documenting the aggregate patterns that constitute between-group inequalities."[107] Partially as a result of this disagreement, almost no empirical research testing Kimberlé Crenshaw's 1989 hypothesis—that multiple claimants fare worse in court than do single claimants—has been done.[108]

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101. *Id.* at 1562.
102. Kotkin, *supra* note 3, at 1461.
103. Best et al., *supra* note 8.
104. *Id.* at 998.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 999.

### B. *Prior Existing Studies of Litigation Outcomes for Multiple Claimants and Their Limitations*

One study that analyzed litigation outcomes for multiple claimants took a random 2% sample of over 50,000 employment discrimination cases between 1965 and 1999.[109] This resulted in 1,014 court opinions, of which 18% were multiple claims.[110] Multiple claimants prevailed approximately 15% of the time, while single claimants prevailed approximately 31% of the time, making multiple claimants less than half as likely as single claimants to prevail.[111] While comprehensive, this study only analyzed multiple claims brought on the bases of race and sex, and did not analyze cases alleging age, disability, or other categories as bases of discrimination.[112] Additionally, the study found that intersectional claims increased dramatically over time, starting in the 1990s.[113] The proportion of multiple claims may very well have continued to rise after the study concluded in 1999.[114] "This increasing prevalence highlights the importance of learning how these claims are faring."[115]

The only other empirical study of the litigation outcomes of multiple claimants was based on a sample of twenty-six multiple-claim decisions selected from the Southern and Eastern Districts of New York over a one-year period from June 2006 to June 2007.[116] Based on this sample, the study found that summary judgment was granted for the employer in twenty-two out of the twenty-six cases.[117] In three of the remaining four cases, the defendant won partial summary judgment, and the case moved forward on at least one of the theories of discrimination.[118] In only one case did the employee fully defeat the employer's summary judgment motion.[119] This means that the employee fully survived summary judgment only 3.8% of the time.[120] If partial success is included, this percentage rises to 15.3%.[121] While revealing, this

109. *Id.*
110. *Id.* at 999, 1002.
111. *Id.* at 1009.
112. *See id.* at 1003.
113. *Id.* at 1008.
114. *Id.*
115. *Id.* at 1009.
116. Kotkin, *supra* note 3, at 1458.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

study was admittedly limited in scope,[122] and did not use a control group of single claim cases from the same courts during the same time to measure the differences in outcome between the two groups.[123] Thus, the study in this Article, described in more detail in the next section, is aimed at addressing some of the limitations of previous studies, as well as contributing to the growing body of research in employment litigation outcomes for multiple claimants.

## IV. An Empirical Study of Employment Discrimination Claims in the Eighth Circuit Court of Appeals from 2008–2010

### *A. Methodology*

The data used in this study is based on 162 employment discrimination cases from the Eighth Circuit, from 2008 to 2010.[124] This sample includes all employment discrimination cases that were appealed to the Eighth Circuit Court of Appeals during that time frame.[125] This allows analysis of both how district courts deal with multiple discrimination claims, as well as how they are dealt with at the appellate level.[126] All the cases were entered into a spreadsheet. The spreadsheet recorded for each case what statute(s) the claim was brought under,[127] what basis(es) of discrimination the plaintiff was claiming,[128] whether the case was published at the appellate level, whether the plaintiff was pro se, and a brief description of the outcome of the case (i.e., plaintiff lost at summary judgment at district court, affirmed by the Eighth Circuit).[129] The district court's grant of summary judgment was recorded as either whole or partial, and the appellate decision was

122. *Id.*

123. *See* Best, et al., *supra* note 8, at 1007; Kotkin, *supra* note 3, at 2458.

124. Emma Denny, 8th Circuit Employment Discrimination Case Outcome Chart (Feb. 21, 2012) (unpublished study) (on file with author).

125. *Id.* All known cases were included, based on searching Westlaw for the terms "employment & discrimination," selecting the Eighth Circuit as the database, and limiting results to 2008–10. *See id.* Harassment and hostile work environment cases were excluded from the data. *See id.*

126. *See id.*

127. The claims were bought under Title VII, ADA, Rehabilitation Act of 1973, ADEA, Pregnancy Discrimination Act, Government Employees Rights Act, and 42 U.S.C. § 1983. *Id.*

128. Bases of discrimination alleged by employees included in the spreadsheet are race, sex, disability, national origin, religion, age, pregnancy, and military service. *Id.*

129. *Id.*

recorded as either affirming, or wholly or partially reversing that decision.[130]

### B. Results

Of the 162 total cases in the sample, 53 (32.7%) were based on multiple claims.[131] Of these 53 claims, only 4 (7.5%) made it past summary judgment, either in whole or in part.[132] This means that 92.5% of the plaintiffs in this sample bringing multiple claims of discrimination never made it to trial on any of their claims.[133] This is in comparison to the 33 of 109 (30.3%) employment discrimination cases based on single claims of discrimination in the Eighth Circuit during the same time period that made it past summary judgment.[134] This means that 69.7% of single-claim employment discrimination plaintiffs from this sample did not make it past summary judgment, as opposed to 92.5% of multiple-claim employment discrimination plaintiffs.[135] This is roughly in line with other research in the field.[136]

Several patterns emerge from the data. First, it is apparent that multiple claimants make it past the summary judgment stage less often than single claimants (7.5% of multiple claim plaintiffs, as opposed to 30.3% of single claim plaintiffs).[137] When counting the percentage of multiple claimants whose entire claims survive summary judgment, as opposed to partial success (i.e., surviving summary judgment on a race discrimination claim, but losing on the sex discrimination claim) the number drops to only 1 out of 53 (1.9%).[138]

Second, not only do multiple claimants prevail at the summary judgment stage less often at district court (1.9% of multiple claimants, as opposed to 19.3% of single claimants), but

130. *Id.*

131. *Id.*

132. *Id.* For the purposes of this Article, "making it past summary judgment" will mean plaintiffs who either made it to trial, had a favorable summary judgment decision (in whole or in part), or had an unfavorable summary judgment decision reversed at the appellate level (in whole or in part).

133. *See id.*

134. *Id.*

135. *See id.*

136. *See, e.g.*, Kotkin, *supra* note 3, at 1459. In Kotkin's sample of employment discrimination cases from the Second Circuit over a one-year period, she found that 96% of multiple claims did not make it past summary judgment, as opposed to a rate of 73% of plaintiffs losing at the summary judgment stage (in cases where summary judgment motions were made) overall. *Id.*

137. Denny, *supra* note 124.

138. *Id.*

they also are less likely to have unfavorable pre-trial decisions reversed at the appellate court level (5.8% of multiple claimants, as opposed to 23.8% of single claimants).[139] This indicates that judges do not believe, as a matter of law, that multiple claimants have a sufficient basis to create a genuine issue of material fact to make it to trial, and that this belief exists at both the trial court and appellate court levels at a higher rate than it exists for single claimants.[140]

Third, multiple claimants appear pro se at a higher rate than do single claimants (37.7% of multiple claimants, as opposed to 12.8% of single claimants).[141] However, even when controlling for the increased likelihood of an adverse outcome that accompanies being a pro se plaintiff, by removing the pro se plaintiffs from the data pool, multiple claimants still fare worse than single claimants (12.1% of represented multiple claimants make it past summary judgment, as opposed to 34.7% of represented single claimants).[142] In both categories, 100% of pro se plaintiffs failed to make it past summary judgment.[143]

Fourth, appellate courts publish the decisions of multiple-claim cases at a lower rate than single-claim cases (28.3% of multiple-claim cases, as opposed to 66.1% of single-claim cases).[144] This indicates that courts find single-claim employment discrimination cases more worthy of discussion, and therefore single-claim cases continue to influence precedent at a higher rate than multiple-claim cases, further stifling the development of the law in this area.[145]

### *C. Analysis*

A closer analysis of the four multiple-claim cases that made it past summary judgment is useful because it illustrates the hurdles that multiple claimants face. At the district court level, only one multiple-claim plaintiff defeated the employer's summary judgment motion on any of the claims. That case, *Wimbley v. Cashion*,[146] was also the only case where the plaintiff entirely defeated the employer's summary judgment motion on all

139. *Id.*
140. *See id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See id.*
146. 588 F.3d 959 (8th Cir. 2009).

claims.[147] The district court judgment in favor of the employee's race and sex discrimination claims was also affirmed by the Eighth Circuit Court of Appeals.[148]

In the second case, *Nedeltchev v. Sheraton St. Louis City Center Hotel & Suites*,[149] a race and national origin discrimination case, the employee lost on both claims in district court.[150] The appellate court reversed the adverse grant of summary judgment on the race discrimination claim, but affirmed the adverse grant of summary judgment on the national origin claim.[151]

In the third case, *Maxfield v. Cintas Corp., No. 2*,[152] a race and military service discrimination case, the employee lost at the district court on both claims at summary judgment, but the adverse grant of summary judgment on the military service claim was reversed and remanded by the appellate court.[153] On remand, the district court again granted summary judgment for the employer on the military service discrimination claim, and was again reversed by the appellate court.[154] The district court then granted a jury trial, and the plaintiff ultimately lost at jury trial on the military service claim.[155]

In the fourth case, *Ziegler v. Kempthorne*,[156] the plaintiff brought a claim for age and military service discrimination.[157] The district court granted summary judgment for the employer on both claims, and the appellate court reversed and remanded on the age discrimination claim, but affirmed the adverse grant of summary judgment on the military service claim.[158]

Of the four cases in the data set that survived summary judgment, only one survived on all claims.[159] The other three survived summary judgment on one of their claims, but only on partial reversal of the adverse grant of summary judgment by the appellate court.[160] This data set only includes decisions that were

147. *See* Denny, *supra* note 124.
148. *Wimbley*, 588 F.3d at 963.
149. 335 Fed. Appx. 656 (8th Cir. 2009).
150. *Id.* at 657.
151. *Id.*
152. 563 F.3d 691 (8th Cir. 2009).
153. *Id.* at 692–93.
154. *Id.*
155. *Id.* at 693–94.
156. 266 Fed. Appx. 505 (8th Cir. 2008).
157. *Id.* at 506.
158. *Id.* at 507.
159. *See* cases cited *supra* notes 146–58.
160. *See* cases cited *supra* notes 149–58.

appealed.[161] If all decisions, including those which were not appealed, were included, it is likely that the number of adverse summary judgment decisions for multiple claimants would be closer to the 1.9% of multiple claim plaintiffs who survive summary judgment at the district court level, rather than the 7.5% that survive summary judgment when accounting for appellate reversals.[162] These extremely low numbers indicate the challenges faced by multiple claimants in employment discrimination litigation.

## V. Policy Implications of the Data

This data yields an obvious question: why are multiple claimants faring significantly worse than single claimants by every measure of the data? Several theories may provide an answer to this question.

### *A. Multiple Claimants' Suits Tend to Have Less Merit*

One common argument for why multiple claimants fare worse than single claimants in employment discrimination litigation is because their claims are inherently weaker.[163] Proponents of this theory suggest that the reason for the multiple claims of discrimination is because the plaintiffs are simply adding on additional claims, hoping one of them is successful.[164] One federal judge expressed this viewpoint, stating that plaintiffs who assert multiple claims of discrimination are "throwing a plate of spaghetti at the wall to see what sticks."[165] Consequently, these judges are more skeptical of multiple claimants than they are of the more traditional single-claim employment discrimination plaintiff.

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161. *See* Denny, *supra* note 124.

162. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 107–08 (2009). The authors of this study of employment litigation outcomes in federal court found that only twenty percent of unfavorable decisions at the district court level for employment discrimination plaintiffs were appealed to the circuit court, and of these, only half received a final appellate judgment. *Id.* Because victory rates for multiple claimants were lower at the district court than at the appellate court, it is likely that the overall numbers for multiple claimant victory are closer to the district court numbers, assuming similar appeals rates to the Clermont and Schwab study.

163. Best et al., *supra* note 8, at 1011.

164. *Id.*

165. Michael Bologna, *Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, 19 Emp. Discrimination Rep. (BNA) 595, Dec. 4, 2002 (quoting criticism of plaintiffs' lawyers by United States District Court Judge Ruben Castillo of the Northern District of Illinois).

In a prior study on the effect of multiple claims of discrimination on litigation outcomes, the authors attempted to control and test for this explanation.[166] After controlling for several factors in the data to attempt to measure the correlation between claim intersectionality and the merits of the case, the authors concluded that "intersectional claims are not the result of plaintiffs frivolously adding additional claims."[167] It is, of course, very difficult to test for the inherent strength or weakness of particular claims in an objective, empirically based way, because that would require looking beyond the judicial opinions to the briefs, depositions, testimony, and other trial documents.[168] Such an inquiry is therefore beyond the scope of this study.

One potential factor from the data set in this article is the fact that multiple claimants appear pro se at a higher rate (37.7%) than single claimants (12.8%).[169] Pro se plaintiffs tend to fare worse than represented plaintiffs in employment discrimination litigation.[170] This is partially because they do not have a professional advocate assisting them in making sophisticated legal arguments, and partially because it is likely they have been turned down by numerous attorneys who believed their cases to have poor chances for victory in the first place, suggesting that their cases are inherently weak.[171] Because pro se plaintiffs represent a higher proportion of multiple claimants, one could conclude that multiple claimants have inherently weaker claims overall. However, even when removing the pro se litigants from the data pool, represented multiple claimants still make it past summary judgment (12.1%) at a much lower rate than represented single-claim plaintiffs (34.7%).[172]

Based on the fact that represented multiple claimants fare worse than represented single claimants, as well as prior research on the topic, it seems unlikely that multiple claimants have suits that lack merit at a rate that far exceeds that of single claimants. The argument that multiple claimants have inherently weaker cases, therefore, is unlikely to account for the wide statistical disparity in success rates of multiple and single claimants.

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166. Best et al., *supra* note 8, at 1011.

167. *Id.*

168. *Id.* at 25–26 n.27.

169. *See* Denny, *supra* note 124.

170. Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 56 (2005).

171. *Id.*

172. *See* Denny, *supra* note 124.

### *B. Courts Refuse to Explicitly Analyze Multiple Claims*

While the majority of courts have, at least implicitly, recognized multiple claims, the majority have done so without an explicit recognition of the ways in which multiple claims differ from single claims of discrimination.[173] Courts tend to view each claim independently, each requiring separate bodies of proof, which in turn leads to lower rates of success in the courtroom for multiple claimants.[174] This lack of explicit acknowledgment of multiple claims, and lack of analysis, has led to stifling the development of the law for multiple claimants.[175] This lack of development has led to upholding the status quo in employment discrimination law for multiple claimants, both in the workplace and the courtroom.[176]

This phenomenon can be seen most clearly in the data that show the Eighth Circuit publishes their opinions on single-claim employment discrimination cases at a significantly higher rate (66.1%) than for multiple-claim employment discrimination cases (28.3%).[177] In none of the multiple-claim cases in the data set did a court explicitly address the fact that a particular case involved multiple claims of discrimination, or discuss how cases involving multiple claims of discrimination may require a different analysis than single-claim cases.[178] This observation of the data, both from a quantitative and qualitative perspective, lines up with the anecdotal observations of other scholars in the field, who have decried that "as multiple claims have proliferated, few courts have engaged in any systematic or rigorous analysis of the possibility of

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173. *See* Kotkin, *supra* note 3, at 1461.

174. *See id.* at 1481. As discussed above, requiring multiple claimants to prove each claim separately oftentimes results in a Catch-22 situation whereby the employer can defeat the race claim by showing that employees of the same race but opposite sex were promoted, and can defeat the sex claim by showing employees of the same sex but different race were promoted.

175. Abrams, *supra* note 85, at 2539–40.

176. *See id.* at 2540.

177. *See* Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000), *vacated on rehearing*, 235 F.3d 1055 (8th Cir. 2000). The Eighth Circuit declared unconstitutional its rule that states, "unpublished opinions are not precedent and parties generally should not cite them." *Id.* However, the ruling was later vacated after the parties settled, leaving "[t]he constitutionality of that portion of Rule 28A(i) . . . an open question in this Circuit." *Id.* at 1056. Scholars have criticized judges as engaging in strategic behavior by simply not publishing opinions for difficult cases rather than engaging in a difficult analysis of the issues. *See* Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 192–93 (1998).

178. *See* Denny, *supra* note 124.

complex discrimination."[179] This lack of analysis has stifled the development of the law for multiple claimants, despite an increase in multiple claims as an overall percentage of employment discrimination cases.[180]

The obvious solution is, of course, for courts to explicitly address the challenges facing multiple claimants in their opinions, and to publish cases involving multiple claims at the same rate as cases involving only single claims. However, it is also up to the attorneys representing multiple claimants to be aware of the uphill battle facing their clients, and to alert judges to the disparity between multiple and single claimants in their briefs and summary judgment responses, perhaps using research and literature in the field.[181] As has been noted earlier, there is a lack of quantitative research on the litigation outcomes of multiple claimants,[182] and judges may not be aware of the statistical disparity. It is not until judges and practitioners become aware of this discrepancy, and the lack of precedent offering concrete guidance for the multiple claimant, that precedent specifically addressing the problem will begin to develop.

### C. *Courts Are Reluctant to Allow Plaintiffs to Avail Themselves of the Mixed-Motive Framework at the Summary Judgment Stage of Litigation*

After the Supreme Court decided *Desert Palace*,[183] the lower courts struggled with how to integrate the mixed-motive theory with the *McDonnell Douglas* framework.[184] The Eighth Circuit, in *Griffith v. City of Des Moines*,[185] held that *Desert Palace* does not apply to *McDonnell Douglas* cases at the summary judgment stage because *Desert Palace* was decided in regard to jury instructions.[186] Therefore, a plaintiff cannot avail herself of the benefits of the mixed-motive framework in the Eighth Circuit unless her case makes it past summary judgment.[187] She must prove to a judge

179. Kotkin, *supra* note 3, at 1481.

180. *See* Best et al., *supra* note 8, at 1009.

181. *See* Lee, *supra* note 47, at 499 (arguing that attorneys should offer, and courts should consider, statistical evidence demonstrating the role that unconscious bias plays in the workplace).

182. Best et al., *supra* note 8, at 991.

183. 539 U.S. 90, 100–02 (2003) (holding that if plaintiffs could prove that an illegitimate factor played a motivating part in the employment decision, the burden would shift to the employer).

184. ZIMMER ET AL., *supra* note 35, at 102.

185. 387 F.3d 733, 735 (8th Cir. 2004).

186. *Id.* at 735.

187. *Id.*

that a reasonable jury could find she was discriminated against under the single-factor *McDonnell Douglas* framework before she can progress to trial.[188] As we have seen, only one multiple claimant, out of fifty-three, was able to convince a judge that she was discriminated against under the *McDonnell Douglas* framework, thereby defeating the employer's summary judgment motion.[189] Because a large percentage of multiple claimants lose at summary judgment under the *McDonnell Douglas* framework, the Eighth Circuit is essentially denying these plaintiffs the opportunity to avail themselves of a potentially beneficial mixed-motive theory of discrimination.

Traditional *McDonnell Douglas* cases "could be framed as 'single motive' cases—the employer had either acted from discriminatory motives or it had acted because of its asserted 'legitimate, nondiscriminatory reason.'"[190] However, cases that assert multiple claims of discrimination are, by their very nature, mixed-motive cases, in that the plaintiff is asserting that the employer had multiple illegitimate reasons for the employment decision (race, sex, disability, etc.). Therefore, in trying to force plaintiffs into the single-motive *McDonnell Douglas* framework, courts are attempting to force plaintiffs to split their identity—telling them they must pick one motive for the employment decision, and prove that the employer acted because of it.

While the Title VII framework has been developed to deal with individuals who fall into only one protected category, "perceptions are based on the entire constellation of social attributes of the individual within the interaction—race, gender, physical ability/disability, age—rather than a single dimension."[191] Courts require claimants to prove that employers intentionally discriminated against them, and to be able to articulate on what grounds that discrimination took place. Social science, however, indicates that this is close to impossible because the employer is likely unaware that it is discriminating.[192] Further complicating the picture, multiple claimants might not be able to tease apart the different strands of their identity that may be affecting the stereotypes others hold of them, which makes fitting their case

188. *Id.*

189. Denny, *supra* note 124.

190. ZIMMER ET AL., *supra* note 35, at 43.

191. Browne & Misra, *supra* note 59, at 499.

192. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 979 (2006) ("[A]n 'honest' concern about an employee may very often be both 'honest' and (unbeknownst to the decision maker) entirely a product of the employee's status as an African-American worker.").

into the single-motive *McDonnell Douglas* framework more difficult than for the single-claim plaintiff.[193]

A good example of this effect can be seen in one of the cases from the data set in this article. In *Montes v. Greater Twin Cities Youth Symphonies*,[194] the Black, Haitian-American plaintiff brought a race and national origin discrimination suit against his employer after his termination, citing several examples of statements made to him during the course of employment that he perceived as being discriminatory.[195] One such comment involved board members telling the plaintiff that he "needed to be integrated into the community as an African-American."[196] The board attempted to form a committee that would help him "assimilate" and a subcommittee to address his soft-spokenness and accent.[197] The plaintiff testified that he perceived this attempt to form a committee to help him assimilate to be discriminatory, and a board member testified that she found this suggestion by the board to be inappropriate.[198] However, using the *McDonnell Douglas* framework, the court stated that the plaintiff had failed to provide evidence that his race or national origin was the determinative factor behind the employment decision, stating:

> Board members' suggestions of forming an African-American committee to help Montes assimilate into the Minneapolis community and a subcommittee to address Montes's soft spokenness and accent also did not evince discrimination. At most, this evidence suggested board members were aware of Montes's ethnicity and the issues that could arise within the Minneapolis community and Youth Symphonies, an all-Caucasian organization, as a result. No reasonable jury could conclude this evidence indicated the board terminated Montes's employment because of his race or national origin.[199]

Under the *McDonnell Douglas* framework, the plaintiff was unable to defeat the employer's motion for summary judgment on either claim.

The court did not make explicit how it was analyzing Montes's race and national origin claims, but it is easy to see how hard it was to separate the employer's proffered reason for the

193. *See* Wendy Hulko, *The Time- and Context-Contingent Nature of Intersectionality and Interlocking Oppressions*, 24 AFFILIA: J. WOMEN & SOC. WORK 44, 49 (2009).

194. 540 F.3d 852 (8th Cir. 2008).

195. *Id.* at 854.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 859.

termination (the plaintiff's continued refusal to cooperate with the board of directors) from the potential illegitimate reasons (some combination of the plaintiff's race and national origin). If the employer had offered to send the plaintiff in *Price Waterhouse* to "a course at charm school" in order to help her become more feminine, would that have been discrimination? If she had refused to attend, would that be further evidence of her difficult personality? Because the plaintiff perceived the proposed African-American committee to be discriminatory, he declined to participate, something which the board may have perceived as him being "difficult."[200] Was the committee formed because of his race or national origin? Was his resistance to participating in it him being legitimately difficult, or rather, a reasonable response to perceived discrimination? If it was reasonable, then was the employer's perception of him as "difficult" partially based on illegitimate discrimination? These are all questions the court may have better been able to address under a mixed-motive theory.

By forcing the plaintiff into the *McDonnell Douglas* framework, the court precluded him from a potential mixed-motive theory.[201] Under a mixed-motive theory, the plaintiff may have been able to show that while the employer's proffered reasons for his termination—his allegedly difficult personality and refusal to cooperate—played a role in the decision, his race and/or national origin also played a motivating part of the decision. Under this framework, the plaintiff has a lower bar to meet than under *McDonnell Douglas*.[202] If the plaintiff had succeeded in showing that race and/or national origin had played a motivating part of the decision, along with his alleged personality defects, the burden would have then shifted to the employer to show that they would have made the same decision even absent the illegitimate criteria.[203] Whether the plaintiff would have been able to proffer such evidence is an open question, but at least he likely would have been able to meet his initial burden under the mixed-motive theory at the summary judgment stage.

It seems likely that multiple claimants—whose claims, by their very nature, are "mixed-motive"—would stand to benefit the most from judges analyzing their claims through a mixed-motive framework at the summary judgment stage. Because judges still

200. *Id.* at 856.
201. *Id.*
202. ZIMMER ET AL., *supra* note 35, at 43.
203. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

insist on analyzing each claim separately,[204] plaintiffs must prove something at the summary judgment stage (that one basis for discrimination was the determinative factor in the employer's decision) that they would not have to prove at trial under a mixed-motive framework.

The Ninth Circuit provides one potential approach for integration of *McDonnell Douglas* and *Desert Palace*. This approach, outlined in *Dominguez-Curry v. Nevada Transportation Department*,[205] allows the plaintiff to advance a mixed-motive theory at the summary judgment stage when she would not be able to meet her burden under *McDonnell Douglas*.[206] In reversing the district court's adverse grant of summary judgment, the appeals court stated that "[a]n employer may be held liable under Title VII even if it had a legitimate reason for its employment decision, as long as an illegitimate reason was a motivating factor in the decision."[207] This approach "would essentially allow *McDonnell Douglas*[—]along with all the other theories that can be applied, with all pointing toward the ultimate question of liability for discrimination[—]to be determined by . . . [the] 'motivating factor' test."[208]

More research is needed to determine if allowing the mixed-motive framework to be advanced at the summary judgment stage would help narrow the discrepancy between multiple and single claimants. However, due to the inherently "mixed" nature of multiple claims, and the difficulties involved with distinguishing the multiple potential illegitimate factors from the potential legitimate factors, it seems probable that the Ninth Circuit's approach would go a long way towards narrowing this gap.

### D. *The Requirement of Similarly Situated Comparators Disproportionately Disadvantages Multiple Claimants*

The most common stumbling block for multiple claimants is the third stage of the *McDonnell Douglas* burden-shifting framework, when they must show that the employer's proffered reason for the adverse employment action was mere pretext for

204. *See* Kotkin, *supra* note 3, at 1461 (stating that while courts have recognized plaintiffs are allowed to bring claims based on multiple protected categories, most courts still analyze each claim separately).

205. 424 F.3d 1027 (9th Cir. 2005).

206. *Id.* at 1037–42.

207. *Id.* at 1040.

208. ZIMMER ET AL., *supra* note 35, at 104.

discrimination.[209] The plaintiff's burden of proving that the reason was a pretext for discrimination is very difficult to meet, and even more difficult for multiple claimants.[210] This is because the most common method of proving pretext is to show that similarly situated employees who do not belong to the plaintiff's protected class received more favorable treatment.[211] Most courts require that a comparator be someone who shares none of the protected characteristics of the plaintiff, so that a Black, female plaintiff would have to use a non-Black, male comparator to prove pretext.[212] One court remarking on the difficulties facing multiple claimants with regards to finding a comparator stated that "the more specific the composite class in which the plaintiff claims membership, the more onerous th[e] ultimate burden" of proving discrimination.[213]

Courts have argued that the comparator requirement is necessary to prove intent, and that a finding of discrimination cannot be made without a showing that the plaintiff "received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."[214] The problem with the view that an employee cannot prove discrimination unless he or she can point to similarly situated individuals who were treated more favorably is that it constricts the very idea of discrimination.[215] As common sense and case law reveal, discrimination can occur in the absence of a similarly situated comparator.[216] However, courts will typically only find that discrimination occurred if there is a similarly situated comparator who was treated better, meaning that if an employee was discriminated against, but no suitable comparator can be found, he or she is often without a remedy in court.[217] Scholars argue that due to the problems of finding a similarly situated comparator, the comparator requirement has left multiple claims "virtually noncognizable in the adjudication context."[218]

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209. *See, e.g.*, Bearden v. Int'l Paper Co., 529 F.3d 828, 831–32 (8th Cir. 2008).

210. Kotkin, *supra* note 3, at 1491.

211. *Id.*

212. *See* Wimbley v. Cashion, 588 F.3d 959, 962 (8th Cir. 2009).

213. Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

214. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring) (quoting *id.* at 616 (Thomas, J., dissenting)).

215. Goldberg, *supra* note 7, at 732.

216. *Id.* at 733 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989), in which the Supreme Court found that the plaintiff was discriminatorily denied partnership, despite the absence of comparators).

217. *See id.* at 735.

218. *Id.* at 738.

This effect can be seen at play in one of the cases from the data set, *Wimbley v. Cashion*.[219] Unsurprisingly, this is the only case in the data set in which the plaintiff wholly defeated the employer's motion for summary judgment at both the district and appellate court levels. In this case, the plaintiff, a Black, female prison guard, was involved in an incident where she discharged her pepper spray on an inmate in violation of prison policy.[220] The plaintiff claimed it was accidental, and during litigation, several inmates corroborated her version of the story.[221] A White, male prison guard was present as well, and also discharged his pepper spray on an inmate, arguably in violation of prison policy, in what he claimed was an attempt to subdue the prisoner.[222] Inmates later contradicted the male guard's claim that the inmate he used the pepper spray on was resisting.[223] The warden immediately terminated the plaintiff, without launching an internal investigation of her actions, as was required by prison policy.[224] The warden took no disciplinary action against the White, male guard.[225] The court found that this discrepancy in the way the warden treated the two guards created a genuine issue of material fact for the jury, and upheld both the race and sex claims.[226]

This case illustrates the rare circumstances that must be present in order for a multiple claimant to prevail on his or her claim for summary judgment. The "individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances."[227] Further, the comparator must fall into none of the same protected categories as the plaintiff.[228] What if, instead of being involved in this incident with a White, male prison guard, the plaintiff was involved in this incident with a White, female prison guard who was not subsequently terminated? What if there had also been a Black, male prison guard present, and neither he nor the White

219. 588 F.3d 959 (8th Cir. 2009).
220. *Id.* at 961.
221. *Id.* at 963.
222. *Id.* at 961.
223. *Id.* at 963.
224. *Id.*
225. *Id.* at 961.
226. *Id.* at 963.
227. Hervey v. Cnty. of Koochiching, 527 F.3d 711, 720 (8th Cir. 2008) (citing Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000)).
228. *Wimbley*, 588 F.3d at 962 ("[Defendant] argues that Wimbley cannot establish that she was treated less favorably than a similarly situated, non-African-American, male.").

female prison guard were subsequently terminated? Arguably, the court would have ruled that no discrimination occurred, because the race and sex claims could each be separately defeated.[229]

What if the White, male guard had a different supervisor than the plaintiff, and the two different supervisors made the exact same decisions that were made in this case, one firing the plaintiff, the other one not firing the White, male guard? Arguably again, the court would have ruled that there was no discrimination as the one possible comparator would have to be excluded because he would not meet the "same supervisor" requirement.[230] What if there simply was no other guard present during the incident, but the employer still fired the plaintiff, even though he would not have done so had she been a White male? There, the plaintiff would have a very difficult time proving her case because she would have no evidence to present to prove her claim that she was fired because of her race or sex. She could perhaps point to other similar incidents where White, male guards were not disciplined as harshly as she, but the court could easily distinguish those incidents from the one in which she was involved.

Despite being a victory for the plaintiff, this case shows the difficulties inherent in bringing multiple claims of discrimination. The plaintiff simply got lucky in terms of the viability of her case. She was involved in the exact same incident, at the exact same time, with a coworker who shared the exact same job responsibilities as her, had the exact same supervisor, happened to share none of the protected characteristics, and was treated in exactly the opposite way that she was after the incident. If any of these factors were to change, it is likely the plaintiff would not have survived summary judgment, despite the fact that those factors arguably had little, if anything, to do with whether or not discrimination occurred. The plaintiff in this case is an anomaly, as can be demonstrated by the fact that she was the only multiple claimant, out of fifty-three, to wholly defeat the employer's summary judgment motion.

Scholars have argued for a few different options to replace or modify the comparator requirement. One option is simply to expand the available pool of comparators by allowing individuals to serve as comparators despite differences in job descriptions or supervisors.[231] However, this solution generally requires expert

229. *See* Areheart, *supra* note 91.

230. *See Hervey*, 527 F.3d at 720.

231. Kotkin, *supra* note 3, at 1497–98.

testimony to determine who is similarly situated.[232] Another solution is to allow for hypothetical as well as actual comparators. This is an approach taken by the European Union, which, through its discrimination-related directives, has provided that discrimination can be found "where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin."[233] However, the problem with hypothetical comparators is they are "exceedingly difficult to conceptualize in a way that would capture discriminatory conduct but not workplace behavior that is offensive but permissible."[234]

Because the comparator requirement is simply a proxy for intent,[235] the use of comparators should still be available as one factor in determining whether the plaintiff was discriminated against, but as one factor among many, including "comments and acts by other employees, firm demographics, and firm policies, among other aspects of workplace life and governance."[236] Again, statistical data and expert testimony regarding the role of unconscious bias in workplace decisions could be introduced as part of a plaintiff's showing of pretext, instead of relying solely on finding proper comparators.[237] If some combination of these suggestions were implemented, it could potentially help eliminate the discrepancy between multiple and single claimants in employment discrimination litigation.

## Conclusion

The data presented in this and other studies show what intersectionality scholars have attempted to describe—that multiple claimants fare worse in employment discrimination litigation than do single claimants. The problems are systemic, and are perpetuated and amplified by most courts' failure to analyze the difficulties posed by multiple claims, by courts continuing to "split" plaintiffs' identities by analyzing their claims separately, by courts not consistently allowing plaintiffs to avail

232. Goldberg, *supra* note 7, at 808 ("The difficulty with experts . . . comes in drawing the link from the insights of the implicit bias and structurally focused literatures to the dynamics of a specific workplace and the adverse treatment of a particular employee.").

233. Council Directive 2000/43, art. 2, 2000 O.J. (L 180) 22, 24 (EC).

234. Goldberg, *supra* note 7, at 807.

235. *Id.* at 731 n.3 (arguing that the use of comparators is simply a means by which judges attempt to view the unviewable dimension of employer intent).

236. *Id.* at 809.

237. *See* Lee, *supra* note 47, at 498–99.

themselves of the mixed-motive framework at the summary judgment stage of litigation, and by the difficulties of finding a proper comparator. While concrete solutions may seem difficult, one thing is clear: the system as it currently exists is unworkable for multiple claimants and a more rigorous analysis by courts is needed to address the unique problems facing multiple claimants.